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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL MARTINEZ, Defendant and Appellant.	B260141 **(**Los Angeles County Super. Ct. No. PA076500**)**

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed.

Janet Uson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Daniel Martinez was prosecuted for aiding and abetting a residential burglary by acting as the driver of the getaway car. The jury convicted defendant of burglary in the first degree, and found true the allegation that a person, other than an accomplice, was inside the residence. On appeal, defendant contends there is insufficient evidence to establish he knew the perpetrator of the burglary, Tobias Summers, planned to commit a burglary, and therefore the People failed to establish he possessed the requisite intent to aid and abet. We conclude defendant's statements to police, his conduct at the scene, the testimony of an eyewitness who overheard defendant and Summers discussing a "gold job" or a "silver job" shortly before the burglary, and defendant's history of committing criminal acts with Summers, constitute sufficient evidence to support the conviction. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Burglary

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on March 26, 2013, defendant, Summers, John Morgan (Summers's friend), along with Summers's brother and his girlfriend, rented a room at a hotel in Northridge. Throughout the afternoon and evening, the group consumed alcohol and drugs, including methamphetamine obtained by defendant.

At approximately midnight, Morgan overheard a conversation between Summers and defendant regarding a job. According to Morgan, defendant asked Summers if the job was "a silver job." Summers responded that the job was "a gold job." Morgan also heard Summers "say something about doing gangster stuff." Morgan didn't know what the pair meant by "gold" and "silver" jobs, or "gangster stuff," but thought defendant and Summers were speaking to each other in some type of code. Summers and defendant left the hotel shortly after the conversation took place, in the early morning hours of March 27, 2013.

Summers and defendant left the hotel in Summers's car; Summers was driving. As they drove away from the hotel, Summers "start[ed] talking about the gangster shit." Then Summers said to defendant, "Let's go bust a lick," which defendant understood to mean that Summers wanted to commit "some fucking robberies or some shit," or a crime involving theft of property. In his interview with a police detective, defendant admitted that a "lick" could also mean breaking into a house. After driving a short distance from the hotel, Summers stopped the car in an alley near a residential neighborhood and got out of the car, leaving his keys with defendant. Defendant waited in the car, in the passenger seat, for approximately 10 to 15 minutes. When defendant heard the sound of glass breaking in the distance, he assumed Summers was "doing some fucking houses or some fucking cars or some shit." Defendant moved to the driver's seat and drove the car in the direction of the breaking glass, looking for Summers in order to drive him away from the scene. When defendant did not see Summers out on the street, he assumed Summers was inside one of the houses. Defendant returned to the alley, where Summers initially left the car, and waited.

After a few minutes, defendant saw two shadowy figures—Summers and a young girl—holding hands and walking quickly down the alley, toward the car. Defendant drove the car toward them. When the car reached Summers, he opened the back door to the car and pushed the girl into the back seat. Summers then got into the car and sat in the front passenger's seat. Defendant started driving, then looked in the back seat and saw the young girl, who appeared to be eight- or nine-years-old. He was confused and surprised by the girl's presence, but continued driving. When defendant asked Summers why the girl was there, Summers responded, "things got weird. I had to take her with me." After defendant had driven a few blocks from the scene, he pulled the car over to the curb and urged Summers to take the girl to a fire station or an emergency room. Defendant then got out of the car and walked away.

Defendant returned to the hotel room at approximately 4 a.m. on March 27, 2013. Defendant entered the room and sat on the bed, where Morgan was sleeping. He told Morgan that Summers broke into a house and kidnapped a young girl. Defendant

denied going into the house and told Morgan "he was just the driver;" however, defendant mentioned it was "the third house that they had either hit or tried to hit that night." According to Morgan, defendant appeared to be "freak[ed] out" by what had happened—particularly the kidnapping—and said he hoped the girl "wasn't dead." Later that morning, Morgan and defendant were watching television and saw a breaking news report about a missing girl from Northridge. When the station broadcast a picture of the missing girl, defendant identified her as the girl Summers brought to the car that morning.

Police officers interviewed defendant twice during the course of their investigation. In addition to recounting the events relating to the burglary and kidnapping, defendant told the officer he had known Summers for approximately 10 years. In the past, defendant said, he was "helping [Summers] out with a robbery—the burglaries, doing stuff like that, cars, stuff like that." They lost touch when defendant went to prison after stealing a car, but had recently reunited. Defendant also told the officers about Summers's approach to committing crimes, saying he generally would premeditate his crimes, plan the details, and scope out locations in advance.

B. The Charges

On October 30, 2013, the People filed an information charging defendant with one count of kidnapping (§ 207, subd. (a)) and one count of residential burglary (§ 459), alleging as to both counts that the offense was a serious or violent felony, or an offense requiring registration pursuant to section 290, subdivision (a), and required the sentence to be served in state prison.[1] (§ 1170, subd. (h)(3).) In connection with the burglary count, it was also alleged that a person, other than an accomplice, was inside the residence during the commission of the crime. (§ 667.5, subd. (c).) Defendant pled not guilty as to both counts and denied the special allegations.

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[1] The information also named Summers and, in addition to charging him with burglary and kidnapping, contained 36 additional counts pertaining to sexual assault of the 10-year-old kidnap victim.

C. The Verdict and Sentence

Defendant's jury trial took place over the course of several days in October 2014. The jury found defendant guilty of burglary in the first degree, and found true the allegation that a person was present in the residence at the time of the burglary. The jury acquitted defendant of kidnapping. The court denied probation and sentenced defendant to the high term of six years in state prison, due to the particular vulnerability of the victim, defendant's failure to assist the police in locating her even after seeing news reports that she was missing, and defendant's past history of repeatedly violating probation. The court imposed a $40 court operations assessment (§ 1465.8, subd. (a)(1)), a $30 criminal conviction assessment (Govt. Code, § 70373, subd. (a)), a $10 crime prevention fee (§ 1202.5, subd. (a)), and a $300 victim restitution fine (§ 1202.4, subd. (b)). Defendant appeals.

DISCUSSION

The Evidence Is Sufficient to Support the Defendant's Burglary Conviction Under an Aiding and Abetting Theory.

Defendant contends there is no substantial evidence he aided and abetted Summers in committing the burglary. We disagree.

The standard of our review is well established. " ' "When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence . . . from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' [Citation.]" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213 (*Rangel*).) " 'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the

credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The People sought to convict defendant of burglary on the theory that he aided and abetted Summers in the commission of the offense. A person aids and abets the commission of a crime when he or she, "acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) With respect to burglary, the intent to aid and abet must be formed prior to or during the commission of the offense, i.e., before the perpetrator leaves the burgled premises. (See *People v. Montoya* (1994) 7 Cal.4th 1027, 1044-1045.)

Defendant does not dispute that Summers committed a burglary. Rather, he argues that although he was in the car while Summers committed the burglary, he was unaware Summers planned to do so, and therefore he did not intend to aid and abet Summers. According to defendant, he was simply a passenger in Summers's car and although he eventually suspected Summers may have been committing a crime, he did not know with certainty, and did not intend to assist him. It is true, as defendant notes, that "[m]ere presence at the scene of a crime is not sufficient to constitute aiding and abetting . . . . " (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530 [citing *People v. Durham* (1969) 70 Cal.2d 171, 181]; see also *People v. Em* (2009) 171 Cal.App.4th 964, 970.) However, because intent to aid and abet is rarely established by direct evidence, a jury may infer intent from circumstantial evidence: "Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense. [Citations.]" (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094-1095; *In re Gary F.* (2014) 226 Cal.App.4th 1076, 1080.)

Here, defendant's conduct both before and after the burglary supports a reasonable inference that defendant intended to facilitate or encourage the burglary and engaged in conduct that did so.

Before defendant and Summers left the hotel together, they talked about "gangster shit," and "a job." Defendant asked Summers whether the job was a "silver job," and Summers responded it was a "gold job." Construing this evidence in the light most favorable to the conviction, we conclude the jury could reasonably have inferred that Summers surreptitiously disclosed his plan to commit a burglary during this conversation and requested defendant's assistance in doing so. Specifically, the jury could reasonably have interpreted the word "job" to mean "a crime" or "a burglary," and could also have construed the qualification of the job as "silver" or "gold" as coded references to particular crimes, such as burglary. The fact that defendant and Summers had known each other for many years, and had a history of committing crimes together, further supports the inference that they were using a code known to both of them, as Morgan surmised.

Defendant contends that Morgan's testimony about this conversation has no probative value because Morgan did not fully understand the conversation and could not discern exactly what crime Summers and defendant planned to commit. However, it makes no difference whether Summers and defendant disclosed their plans to Morgan, or whether Morgan understood the conversation. The relevant point is that defendant and Summers had a conversation and they appeared to understand each other. The conversation, whether Morgan understood it or not, supports a reasonable inference that defendant and Summers later acted in concert and with a mutual understanding.

Defendant also asserts Morgan's testimony was inherently unreliable because Morgan admitted that, during the week preceding his interview by police, he had ingested significant amounts of alcohol and drugs, and had been awake for six days straight prior to the interview. Further, defendant contends Morgan's testimony should be discounted because it contained a number of inaccuracies and internal inconsistencies. In making these arguments, defendant invites us to disregard the jury's

assessment of Morgan's credibility and the reliability of his testimony. We decline to do so. (See *People v. Whisenhunt* (2008) 44 Cal.4th 174, 200 ["We do not reweigh evidence or reevaluate a witness's credibility"].)

In any event, even if Summers did not fully disclose his intent to defendant during the conversation at the hotel, he did so during their subsequent conversation in the car. According to defendant, as soon as they drove away from the hotel, Summers began talking to defendant about "gangster shit," and said he planned to "bust a lick." Defendant admitted, during one of his police interviews, that he understood Summers to mean he planned to commit a burglary or a robbery. Thus, the jury could reasonably have concluded that defendant's subsequent actions were done with knowledge of Summers's burglarious intent, and were therefore designed to assist Summers with the crime.

Nevertheless, defendant argues the evidence does not establish he knew Summers planned to commit a burglary. Defendant points out that during his police interviews, he "consistently and repeatedly denied" planning a burglary with Summers or knowing Summers's plans. Defendant distances himself from the incriminating statements he made during his police interviews, and instead emphasizes other statements he made during the interviews, in which he provided a number of different accounts of the conversations he had with Summers in the car about their intended destination. By making these assertions, defendant improperly construes the conflicting evidence in favor of his innocence rather than in favor of the jury's verdict, as is required. (See *Rangel, supra*, 62 Cal.4th at p. 1212 ["When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment"].) In any case, the jury was entitled to reject defendant's self-serving denials of guilt and instead credit those statements which tended to incriminate him. (See *People v. Silva* (2001) 25 Cal.4th 345, 369 ["A rational trier of fact could disbelieve those portions of defendant's statements that were obviously self-serving"].)

Defendant's actions in the alley during and immediately following the burglary provide additional evidentiary support for the conviction. First, defendant waited in Summers's car, in the alley, for 10 to 15 minutes with no apparent purpose—other than acting as the getaway driver. Then, after he heard glass breaking, defendant concluded Summers must have been breaking into a car or a house. He drove the car out of the alley and around the block, toward the sound of the breaking glass. On this point, the jury did not need to speculate about the defendant's intent because he admitted to police that when he drove around the block he was looking for Summers and planned to drive him away from the crime scene. Finally, after defendant drove around the block but was unable to find Summers, defendant returned to the alley so that Summers would be able to find him later, and would then have the means to flee.

Taken together, these facts provide ample support for the jury's burglary conviction.

DISPOSITION

The judgment is affirmed.

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LAVIN, J.

WE CONCUR:

ALDRICH, Acting P. J.

HOGUE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.